

Fordham Environmental Law Review

Volume 6, Number 3

2011

Article 10

Overtaking the Fifth Amendment: The Legislative Backlash Against Environmnetalism

Michael Allan Wolf*

*

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

OVERTAKING THE FIFTH AMENDMENT: THE LEGISLATIVE BACKLASH AGAINST ENVIRONMENTALISM

MICHAEL ALLAN WOLF*

Except in pockets of ignorance and malice, there is no longer an ideological war between conservationists and developers. Both share the perception that health and prosperity decline in a deteriorating environment. They also understand that useful products cannot be harvested from extinct species. If dwindling wildlands are mined for genetic material rather than destroyed for a few more boardfeet of lumber and acreage of farmland, their economic yield will be vastly greater over time. Salvaged species can help to revitalize timbering, agriculture, medicine, and other industries located elsewhere. The wildlands are like a magic well; the more that is drawn from them in knowledge and benefits, the more there will be to draw.

— Edward O. Wilson¹

Something is fundamentally wrong in our country when a rat's home is more important than an American's home. At the rate we're going, it won't be long before we're forced to add people to the Endangered Species List.

—Representative Billy Tauzin (D.-La.)²

INTRODUCTION

These are heady times for the champions of private property rights.³ The U.S. Supreme Court, in *Dolan v. City of Tigard*,⁴ building on the foundation laid in *Nollan v. California Coastal Commission*⁵ and *Lucas v. South Carolina Coastal Council*,⁶ chastised a local government for its apparent failure to demonstrate that the development conditions placed on a commercial landowner were "roughly proportional" to the city's goals of floodplain protection and traffic regulation. Judges sitting on the U.S. Court of Claims ("Claims

* Professor of Law and History, University of Richmond. The author thanks Jay Taylor for his vigilant and skillful research assistance.

1. EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 282 (1992).

2. W.J. "Billy" Tauzin, *'If You Take It, Pay For It': Something's Wrong When a Rat's Home Is More Important than an American's Home*, Roll Call, July 25, 1994, available in LEXIS, Nexis library, CURNWS File [hereinafter Tauzin I].

3. See, e.g., Richard Miniter, *You Just Can't Take it Anymore: America's Property Rights Revolt*, POL. REV., Fall 1994, at 40.

4. 114 S. Ct. 2309 (1994).

5. 483 U.S. 825 (1987).

6. 112 S. Ct. 2886 (1992).

Court”), a veritable hotbed of regulatory takings activity,⁷ have issued a series of opinions resulting in hefty bills for federal defendants.⁸ Most intriguingly, the election of Republican majorities in both houses of Congress, impelled in part by public promises by party leaders to live up to the terms of the “Contract with America,”⁹ has dra-

7. See, e.g., Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings in the United States Claims Court: Adjusting the Burdens That in Fairness and Equity Ought to Be Borne by Society as a Whole*, 40 CATH. U. L. REV. 549 (1991); George W. Miller & Jonathan L. Abram, *A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit*, 42 CATH. U. L. REV. 863 (1993); Michael Allan Wolf, *Takings Term II: New Tools for Attacking and Defending Environmental and Land-Use Regulation*, 13 N. ILL. L. REV. 469, 504-10 (1993); Thomas Hanley, Comment, *A Developer's Dream: The United States Claims Court's New Analysis of Section 404 Takings Challenges*, 19 B.C. ENVTL. AFF. L. REV. 317 (1991); Patrick Kennedy, Comment, *The United States Claims Court: A Safe "Harbor" from Government Regulation of Privately Owned Wetlands*, 9 PACE ENVTL. L. REV. 723 (1992); Timothy G. Warner, Note, *Recent Decisions by the United States Claims Court and the Need for Greater Supreme Court Direction in Wetlands Protections Cases*, 43 SYRACUSE L. REV. 901 (1992); Seth E. Zuckerman, Note, *Loveladies Harbor, Inc. v. United States: The Claims Court Takes a Wrong Turn—Toward a Higher Standard of Review*, 40 CATH. U. L. REV. 753 (1991).

8. See Wolf, *supra* note 7 (citing \$60,296,000 judgment in *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 417 (1989), *corrected by* 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169, 1174, 1178 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) (taking effected by statutory prohibition of surface mining of alluvial valley floors); \$2,658,000 judgment in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 160-61 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) (Army Corps of Engineers' [hereinafter Corps] denial of fill permit); and \$933,921 judgment in *Formanek v. United States*, 26 Cl. Ct. 332, 340-41 (1992) (same). A fourth instance of compensation for a regulatory taking, the \$1,029,000 judgment in *Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161, 175-76 (1990) (same), was vacated and remanded by *Florida Rock Industries Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 63 U.S.L.W. 3534 (Jan. 17, 1995). See also *Goodwyn v. United States*, Nos. 91-1575L & 92-120L, 1994 WL 703384 (Cl. Ct. Dec. 15, 1994) (construction of dike by Corps destroyed property rights; \$1.3 million judgment); *Bowles v. United States*, 31 Cl. Ct. 37, 53 (1994) (\$55,000 judgment for Corps' denial of permit to fill lot to install septic system); *NRG Co. v. United States*, 30 Cl. Ct. 460 (1994) (taking effected by statutory cancellation of permits to explore for coal on Native American lands). The judgment amounts do not include interest, court costs, and attorney's fees, which can prove extremely costly to the government as well.

9. See, e.g., *The GOP Contract on the Environment*, S.F. CHRON., Jan. 3, 1995, at A16:

The Republicans' controversial "Contract With America" legislative agenda does not mention even once the word "environment." Yet buried throughout the contract's legislative proposals, which the signatories have promised to pass in the first 100 days, is a wholesale assault on the entire body of environmental protections achieved over the last 25 years—a virtual clear-cutting of laws and regulations designed to conserve environmental resources and protect human health and safety.

The main offending section of the contract is the misnamed "Job Creation and Wage Enhancement Act." Among other features, it would require the government to compensate property owners for the imposition of any federal regulation that reduces the value of a business or property by 10 percent.

See Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong., 1st Sess., §§ 9001-9004 (1995).

matically increased the chances for congressional passage of legislation protecting landowners from the economic effects of a wide range of environmental and land-use regulations.

Others may catalogue¹⁰ and investigate the intricacies of¹¹ the growing number of proposals that have been circulating over the past few years to require agencies of federal, state and local government to take more seriously the important task of protecting Americans' private property rights. Indeed, just keeping track of property rights statutes, not to mention the property rights movement,¹² is a daunting task that falls outside the scope and intent of this Article.

Accordingly, this Article proposes a different, though related, approach. This Article will explore two key rhetorical strategies employed by legislative champions of the property rights movement: (1) relating horror stories about innocent citizens whose property is severely devalued or appropriated by the acts of (allegedly) overzealous officials enforcing (apparently) confiscatory and irrational laws; and (2) contrasting the profound and patriotic motives, goals, and strategies furthered by the property rights movement with the ignoble and nefarious tactics of environmentalists and their governmental allies.

The "database" for this exploration consists of public statements made by members of Congress in support of the Private Property Owners Bill of Rights ("Owners Bill"),¹³ the most serious challenge

10. See, e.g., Robert Meltz, Property Rights Legislation in the 103rd Congress (1994) (Congressional Research Service report).

11. See, e.g., John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URB. L. 327 (1994); David J. Russ, *How the "Property Rights" Movement Threatens Property Values in Florida*, 9 J. LAND USE & ENVT'L. L. 395 (1994); *Recent Legislation*, 108 HARV. L. REV. 519 (1994) (analysis of Utah Code Ann. §§ 63-90-1 to -4; §§ 63-90a-1 to -4 (Supp. 1994)).

12. See, e.g., Minter, *supra* note 3; Peter Overby, *The Politics of Mining; Ronald Reagan and Ed Meese Left Behind a Movement that Could Threaten Environmental, Health and Safety Regulations*, *Common Cause*, June-Aug. 1994, available in LEXIS, Nexis library, CURNWS File.

13. H.R. 3875, 103d Cong., 2d Sess. (1994) [hereinafter Owners Bill]; S. 1915, 103d Cong., 2d Sess. (1994). The text of H.R. 3875 is included as the Appendix to this Article. These two nearly identical bills are the specific focus of this Article, although the rhetoric associated with these proposals has been employed by advocates of other federal property rights legislation. As the 104th Congress began its first session, Tauzin reintroduced the House version and Senator Richard Shelby introduced a slightly amended version of the Owners Bill. See H.R. 790, S. 239, 104th Cong., 1st Sess. (1995). The most significant modification is that compensation is available to property owners who have been "deprived of \$10,000, or 20 percent or more, of the fair market value of the affected portion of the property . . ." S. 239 § 9(a). In the earlier House and Senate versions, compensation would be available to "a private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 50 percent or more of the fair market value, or the economically viable use, of the affected portion of the property . . ." H.R. 3875, § 8(a); S. 1915, § 8(a). One of the Republican "Contract with America" bills goes even farther than the 1995 version of the Owners Bill, requiring compensation for reduction of even 10% of value. Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong., 1st Sess., § 9002(a)(2)(B) (1995).

yet posed to the decades-old practice of judicial resolution of regulatory takings challenges.¹⁴ As variations on the bill make their way through the 104th Congress, on their own¹⁵ or as part of the Job Creation and Wage Enhancement Act of 1995,¹⁶ one can expect the assault on environmental and land-use regulations to grow even more fierce.

By studying the stories, symbols, and hyperbole comprising this private property offensive, one can draw two important conclusions: (1) many of the most prominent legislative champions of expanded private property rights have, somewhat recklessly, targeted federal endangered species regulations as particularly unjustifiable and unnecessary, and (2) this is probably just the opening salvo in a more wide-ranging attack on regulations, ordinances, statutes and even principles of judicial interpretation that shield the public-at-large from extant and anticipated harms. These two realities should not only disturb opponents, but should also concern *advocates* of increased protections for private property owners. For, as important debates such as this one advance beyond the fifteen-second soundbite stage, the rhetorical posturing that accompanies bill sponsorship often dissolves when votes are officially tallied. Moreover, as the difficult task of drafting the language required to reach a majority or, in the face of a veto, a supermajority, begins, it becomes increasingly difficult to hide controversial agendas.

I. THE HORROR: GIVING BIRTH TO A MODEST PROPOSAL

The Owners Bill, introduced into the House of Representatives as H.R. 3875 on February 23, 1994, and into the Senate as S. 1915 on March 17, 1994, is an ambitious proposal. According to its chief sponsor, Representative W.J. "Billy" Tauzin, a Louisiana Democrat who toyed with the idea of switching parties in the wake of Republican victories in November 1994,¹⁷ the Owners Bill:¹⁸

14. The rivers of ink spilled and forests of trees felled in the effort to understand the field of regulatory takings is legendary. For examples of the author's "two cents," see, e.g., CHARLES M. HAAR & MICHAEL A. WOLF, *LAND-USE PLANNING* 875-922 (4th ed. 1989); Wolf, *supra* note 7; Michael A. Wolf, Dolan, Lucas, and the Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land-Use Planning and Environmental Law (Jan. 1995) (unpublished manuscript, on file with the FORDHAM ENVTL. L.J.).

15. See, e.g., S. 239, 104th Cong., 1st Sess. (1995) (Shelby's latest version of the Owners Bill).

16. See *supra* note 9.

17. Tauzin has signed on for at least one more year with the Democrats. See John Biskupic, *Conservative Democrats Plan Coalition in House*, WASH. POST, Dec. 21, 1994, at A20. In the wake of the November 1994 elections, Senator Richard Shelby of Alabama, the chief sponsor of the Owners Bill in the Senate, switched party allegiance to the G.O.P. See Joel Achenbach & Phil McCombs, *The Day After: Sifting Through the Wreckage*, WASH. POST, Nov. 10, 1994, at D1.

18. Tauzin I, *supra* note 2; W.J. "Billy" Tauzin, *Private Property & Public Rights*, CHRISTIAN SCI. MONITOR, Aug. 15, 1994, at 19 [hereinafter Tauzin II].

- requires federal agencies to comply with applicable state and tribal laws relating to private property rights and privacy;¹⁹
- prohibits federal agencies that are implementing ESA or wetlands regulations from entering private property for the purpose of gathering information without written consent from the owner;²⁰
- sets up an administrative appeals process for property owners confronted by adverse ESA and wetlands rulings;²¹ and
- requires compensation to owners who are deprived of 50 percent or more of the fair market value or the economically viable use of their property because of such rulings.²²

While his opponents cry that Congressman Tauzin is the mouthpiece for big business and large-scale developers,²³ Tauzin claims that he joined the ranks of state and federal lawmakers displeased with the judicial mode of resolving disputes between landowners and environmental and land-use regulators as a response to the needs of others: "My commitment to this issue was born out of the horror stories that average, middle-class landowners shared with me."²⁴

While others spend their energies examining Tauzin's apparent ties to the largest stakeholders in this fight, I find it more useful to consider the very stories that he and others claim gave rise to activism on behalf of the Owners Bill. After each tale is told, the tough questions can then be addressed: why is this story relevant to the environmental legislation targeted by Tauzin and his allies ("the relevance inquiry"); and how, if at all, would the Owners Bill affect the "horror" symbolized by the story ("the effect inquiry")?

HORROR STORIES #1, #2, AND #3: When you lose your job in the state of Washington because of an owl, your shrimp boat in Louisiana because of a turtle, or your home in California because of a rat, the cost of environmental protection hits home.²⁵

There can be no doubt that to many Americans in the 1990s, the northern spotted owl, for good or bad, is the "poster species" of the Endangered Species Act ("ESA").²⁶ The logging industry has kept the national press well-informed regarding the economic impact of the ESA on the industry, its employees, and their families.²⁷ Therefore, it cannot be denied that the first horror story—loss of "your job in the State of Washington because of an owl"—has some relevance to the

19. Owners Bill, *supra* note 13, § 3.

20. *Id.* § 4.

21. *Id.* §§ 6 (wetlands), 7 (ESA).

22. *Id.* § 8.

23. See, e.g., Peter A.A. Berle, *Private Property and Public Rights*, CHRISTIAN SCI. MONITOR, Aug. 15, 1994, at 19.

24. Tauzin, *supra* note 2.

25. See Tauzin I, *supra* note 2; Tauzin II, *supra* note 18.

26. 16 U.S.C. §§ 1531-1544 (1988).

27. See, e.g., Glen Martin, *Endangered Listing Could List to Huge Fracas: After the Spotted Owl Turmoil, Its "Coho Chaos,"* S.F. CHRON., Nov. 24, 1994, at A1; *Out of the Woods?*, SACRAMENTO BEE, Jan. 10, 1995, (editorial) at B6.

Owners Bill. That relevance diminishes significantly when one recalls that the primary setting for the legal dispute concerning the owl was federal land and that the commercial interests involved had no "property interest" in the regulated public lands.²⁸ Rather, the timber companies sought to continue to participate in lucrative auctions resulting in sales contracts on timber removed from federally owned and managed old-growth forests.²⁹

Moreover, as District Court Judge William L. Dwyer noted in his factual finding in *Seattle Audubon Society v. Evans*,³⁰ the owl is not the only, or even the major, culprit:

Over the past decade many timber jobs have been lost and mills closed in the Pacific Northwest. The main reasons have been modernization of physical plants, changes in product demand, and competition from elsewhere. . . .

Job losses in the wood products industry will continue regardless of whether the northern spotted owl is protected. A credible estimate is that over the next twenty years more than 30,000 jobs will be lost to worker-productivity increases alone.³¹

Finally, the effect of the Owners Bill on timber jobs would appear to be minimal. To this point, regulatory takings challenges to the ESA by private landowners have been quite rare, even in the Claims Court.³² Indeed, two recent developments further militate against such challenges: (1) the willingness of the current administration to accommodate private owners of old-growth forests,³³ and (2) the pos-

28. See, e.g., *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1299-1300 (W.D. Wash. 1994) ("The legality of a forest management plan adopted by the Secretaries of Agriculture and Interior must be decided in these consolidated cases. Among the federal lands in Washington, Oregon, and Northern California are about twenty-four million acres that are within the geographic range of the northern spotted owl.")

29. See, e.g., *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) ("[T]he public interest and the balance of equities require the issuance of an injunction directing the Forest Service to comply with the requirements of NFMA [National Forest Management Act] by March 5, 1992, and preventing it from selling additional logging rights in spotted owl habitat until it complies with the law.")

30. 771 F. Supp. 1081 (W.D. Wash. 1991).

31. *Id.* at 1095.

32. See, e.g., Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 361 (1994); Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 385-91 (1994).

33. See, e.g., Babbitt, *supra* note 32; Eric Pyne, *High Court's Decision on Habitat Protection: Ruling of the Decade?—Law's Effect on Nonfederal Land at Issue*, SEATTLE TIMES, Jan. 8, 1995, available in LEXIS, Nexis Library, CURNWS File, which states:

The Clinton administration, attempting to avoid a backlash against the Endangered Species Act in Congress, has tried for two years to show the law is more adaptable than its reputation.

A previously little-used section of the law [section 10(b)] allows landowners to avoid such rigid restrictions as the owl circles if they prepare and win federal approval for tailor-made "habitat conservation plans."

sibility that the U.S. Supreme Court will affirm the lower court's holding in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*,³⁴ thereby neutralizing habitat protection restrictions under the ESA.

The second horror story—loss of a “shrimp boat in Louisiana because of a turtle”—is also, to put it kindly, something of a stretch. The frightful situation to which Tauzin is referring involves “the [Commerce] Secretary’s regulations requiring shrimp trawlers to install and use ‘turtle excluder devices,’ also known as ‘TEDs,’ in their nets or to limit their trawling to 90 minutes or less at a time.”³⁵ But things appear to be much more horrible for the five species of endangered and threatened sea turtles that are unfortunate enough to share the waters with shrimp boats:

Researchers have found that during shrimping operations, sea turtles are caught in the large nets, or trawls, pulled behind commercial shrimping vessels. The nets drag the turtles behind the boats and thereby prevent them from surfacing for air. According to one study, once a turtle is within the mouth of a shrimp trawl, the animal’s initial reaction is to attempt to outswim the device. Of course, this strenuous effort consumes oxygen but affords the turtle no opportunity to replenish the supply. Once trapped, if the exhausted turtle is not released quickly, it will drown. Research cited in the administrative record indicates that trawl times in excess of 90 minutes are highly likely to result in the death of a captured turtle.³⁶

While shrimp boat owners may be near and dear to the heart of Mr. Tauzin, particularly those in Louisiana’s Third District, the Owners Bill would do little to improve their economic situation. First, as with logging jobs in the Pacific Northwest, shrimp boats in the Gulf of Mexico (and elsewhere) are not “land,” “any interest in land,” or “any proprietary water right.”³⁷ Second, the economic impact of the regulation does not appear to be even a single lost boat: annual costs per shrimper (including the price of TEDs and up to five percent of shrimp lost during the start-up period) have been estimated to be less than \$350.³⁸

Such plans offer owners greater management flexibility while still protecting species, officials say.

The Clinton Interior Department has persuaded more than 100 landowners to begin work on such plans. At a conference late last year, Joseph Sax, Interior Secretary Bruce Babbitt’s top legal adviser, cited the efforts as evidence the Endangered Species Act works.

34. 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995) (invalidating inclusion of “significant habitat modification or degradation” in FWS rule defining “harm” under § 9(a)(1)(B) of the ESA).

35. *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 324 (5th Cir. 1988).

36. *Id.* at 325.

37. Owners Bill, *supra* note 13, § 5.

38. *Guste*, 853 F.2d at 331.

The last of this terrible trio—loss of “your home in California because of a rat”—is also problematic for advocates of the Owners Bill.³⁹ Here is Tauzin’s version:

This insanity came to a head last year during the California brush fires. Many people watched in dismay as their homes burned down because they were not allowed to dig around them and create fire breaks. Why? Because the US Fish and Wildlife Service summarily and arbitrarily determined that such precautions would disturb the habitat of the kangaroo rat. Imagine that. A rat!⁴⁰

A leading environmentalist has called this tale “the favorite ‘horror story’ of Endangered Species Act opponents.”⁴¹

There can be no doubt about the fact that the wildfire in the Riverside, California area in late October 1993, known as the California Fire,⁴² left a legacy of destruction and heartbreak, particularly for the families in the twenty-nine homes destroyed by the inferno:

The California Fire erupted at about 11:30 p.m. on October 26, 1993, burned throughout the following day, and was officially contained on October 30. The fire ignited when a power line was blown down in high winds. Fanned by winds of up to about 80 miles per hour, the fire covered about 12,000 acres in the first 6 hours and destroyed most of the 29 homes. According to county fire department officials, the fire was of such force, magnitude, heat, and speed that there was no way to suppress it when it was at its full force. Fire experts explained that the speed at which the fire spread, its extreme heat, its 100- to 150-foot-high walls of flames, and its tornado-like winds make describing the fire to someone difficult if that person did not experience it.⁴³

What *is* dubious are the claims by some of the affected landowners, and their allies in the property rights movement, that the Fish and Wildlife Service’s (“FWS”) protection of the endangered Stephens’ kangaroo rat,⁴⁴ “a small nocturnal mammal within a unique family of rodents more closely related to squirrels than to mice and rats,”⁴⁵ is the real culprit.

39. See 140 CONG. REC. E224 (Feb. 23, 1994) (Statement of Rep. Jack Fields) [hereinafter Fields Statement], available in LEXIS, Legis Library, Record File: “We have new tyrants depriving us of our inalienable rights of life, liberty, and property—King George has been replaced by bureaucrats and kangaroo rats.”

40. Tauzin I, *supra* note 2; Tauzin II, *supra* note 18.

41. GAO Debunks Endangered Species “Horror Story,” BUS. WIRE, July 14, 1994 (quoting Michael Bean, Chair of Environmental Defense Fund), available in LEXIS, Nexis Library, CURNWS File.

42. U.S. GENERAL ACCOUNTING OFFICE, ENDANGERED SPECIES ACT—IMPACT OF SPECIES PROTECTION EFFORTS ON THE 1993 CALIFORNIA FIRE (July 15, 1994) [hereinafter GAO REPORT], available in LEXIS, Nexis Library, CURNWS File.

43. *Id.*

44. See 50 C.F.R. § 1711 (1994); 53 Fed. Reg. 38,465 (Sept. 30, 1988) (“Determination of Endangered Status for the Stephens’ Kangaroo Rat”).

45. GAO REPORT, *supra* note 42.

Linking the FWS with the devastation requires a causative trail on the scale of the most demanding fact pattern on a first-year torts exam: the FWS listed the kangaroo rat and mandated that its habitat be protected. Protecting the rat meant that homeowners could not use disking as a mode of weed abatement on their properties, thus subjecting their homes to increased risk of loss in the wildfires that plague southern California. When the California fire began, because the homeowners were not allowed to disk and thereby clear a fire-break, the homes were doomed.⁴⁶

When a homeowner whose home was spared revealed on ABC's "20/20" that he had defied the FWS and disked his property, property rights advocates may have thought that they had all the ammunition they needed.⁴⁷ However, a General Accounting Office ("GAO") study requested by Senator Max Baucus and other supporters of the ESA weakened some of the key links in the causative chain.

First, although the FWS outlawed disking, other weed-abatement techniques were permitted and encouraged by local fire officials. Second, one mobile home on an undisked site was surrounded by the fire but spared. Third, this was not a conflagration that respected natural and artificial firebreaks: "The fire repeatedly jumped many potential barriers that appeared to be reasonable forms of limiting or stopping its spread through western Riverside County. Such barriers included highways, paved and gravel roads, cleared agricultural fields, and the San Diego Canal."⁴⁸

Even if one accepts the Tauzin version of the California fire, serious questions concerning the applicability of the Owners Bill's compensation provisions remain. Section 8(a) of the Owners Bill is available to property owners who experience deprivations "*as a consequence* of a final qualified agency action of an agency head."⁴⁹ To fit the kangaroo rat scenario included above within the definition of this italicized phrase, a court will be asked to move far beyond traditional proximate cause standards.

HORROR STORY #4: In Maryland, a couple was prohibited from preventing erosion on their property because the government told them that it might destroy tiger beetles. Meanwhile, a fifteen-foot

46. See, e.g., Steve Yozniak, *Proposition 3000: Private Property Rights Protection Act Puts State in National Spotlight*, ARIZ. REPUBLIC, Nov. 2, 1994, at 10, available in LEXIS, Nexis Library, CURNWS File.

47. Jessica Mathews, *Endangered Species: The Truth*, WASH. POST, July 17, 1994, at C7, available in LEXIS, Nexis Library, CURNWS File.

48. GAO REPORT, *supra* note 42. But see *New Studies Take Issue with GAO Report on California Fire*, Cal. Env't Daily (BNA), Aug. 19, 1994, available in LEXIS, Nexis Library, CURNWS File (citing reports, one entitled "Rats, Lies and the GAO," critical of GAO Report).

49. Owners Bill, *supra* note 13, § 8(a).

section of their property plunged into the bay. Their home is now the endangered species.⁵⁰

This morality tale is a favorite among opponents of the ESA, although the details vary from one retelling to the next.⁵¹ As with Tauzin's tales, this account of "beetlemania"⁵² is exaggerated and largely outside the reach of the Owners Bill.

First, whether the landowners in this instance, Richard and Barbara Bannister of Lusby, Maryland, could claim that they purchased the parcel with "reasonable investment-backed expectations"⁵³ is far from certain. Even a wholly sympathetic account of the Bannisters' plight reveals that the couple "knew that the house they bought overlooking the Chesapeake Bay in Lusby had problems. They knew it needed work inside and out. They knew it faced erosion that could send it over a 60-foot cliff." In fact, the previous owner of the property had already experienced serious erosion problems.⁵⁴ Undoubtedly, the discovery of endangered puritan tiger beetles on the property is not the "but-for cause" of the Bannisters' problems.

Second, the house did not fall into the Chesapeake Bay. While the loss of fourteen feet of the parcel is no laughing matter, this deprivation would not appear to meet the fifty percent threshold of the Owners Bill.

Third, and most important, the Owners Bill would also be inapplicable to this case because the agency that put a temporary halt to the Bannisters' revetment construction plans was the Maryland Department of Natural Resources ("DNR").⁵⁵ The Owners Bill sanctions "qualified agency action[s]" by "agency heads."⁵⁶ These are *federal* agencies, a fact made clear by the Owners Bill's use of definitions from the Administrative Procedure Act.⁵⁷

50. Fields Statement, *supra* note 39.

51. See, e.g., Walter Williams, *Here's How Congress Meddles in Our Lives*, CINCINNATI ENQUIRER, Oct. 2, 1994, at E3, available in LEXIS, Nexis Library, CURNWS File (discusses "federal agents" and loss of "22 feet").

52. *Maryland Hugs a Bug*, WASH. TIMES, Sept. 9, 1994, at E2, available in LEXIS, Nexis Library, CURNWS File.

53. See *Kaiser-Aetna v. United States*, 444 U.S. 164, 175 (1979) (Court "has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.")

54. Interview with Janet McKegg, Director, Natural Heritage Program, Maryland Department of Natural Resources (Feb. 7, 1995) [hereinafter McKegg Interview].

55. Indeed, the federal agency that was involved in the situation, the Corps, had initially approved the Bannisters' anti-erosion strategy. *Maryland Hugs a Bug*, *supra* note 52; McKegg Interview, *supra* note 54.

56. Owners Bill, *supra* note 13, § 8(a).

57. *Id.* § 9(6). This section refers to the definition of "agency action" in the Administrative Procedure Act, 5 U.S.C. § 551(13) (1988). The APA defines "agency" as "each authority of the Government of the United States" 5 U.S.C. § 551(1) (1988).

The target of the Bannisters' complaint was not the ESA, but Maryland's Nongame and Endangered Species Conservation Act.⁵⁸ This legislation is in fact more restrictive than the federal act, because, unlike the ESA, the Maryland act does not include an incidental "take" provision.⁵⁹ The only exception to the state act's broad reach is a provision permitting the taking of an endangered species "for scientific purposes or to enhance the propagation or survival of the affected species."⁶⁰ This narrow exception provided the solution to the Bannisters' (and the state's) predicament: the couple was allowed to shore up its property and in the process "take" some of the endangered beetles after agreeing to pay for research on the survival of the species.⁶¹

HORROR STORY #5: In Idaho, farmers have coexisted with the microscopic Bruneau Hot Spring Snail [sic] for generations until the U.S. Fish and Wildlife Service listed the snail as endangered. Now, the Service has told area farmers they can no longer share the water, and rural farming must be shut down so as not to disturb the snail's habitat. Not only that, but the Service has also prohibited any cattle grazing. An entire valley of people was out of business. Fortunately, a U.S. District Judge has declared the Service's designation as arbitrary and capricious and delisted the snail. But this case is the exception, not the rule.⁶²

This is perhaps the most puzzling of the terror tales spun by Owners Bill advocates. The relevance to the ESA is apparent, given the fact that the FWS did indeed attempt to list the Bruneau Hot Spring-snail,⁶³ much to the dismay of local ranchers.⁶⁴

However, in December 1993, Senior U.S. District Court Judge Harold L. Ryan issued an order in *Idaho Farm Bureau Federation v. Babbitt*⁶⁵ that in effect de-listed the snail:

In light of the serious due process violations committed by the F & W Service, the court holds unlawful and sets aside the F & W Service final decision to list the springsnail as an endangered species under the Endangered Species Act. Pursuant to 5 U.S.C.

58. MD. CODE ANN. NAT. RES. §§ 10-2A-01 to -09 (1990 & Supp. 1994).

59. ESA § 10(a)(2)(B), 16 U.S.C. § 1539(a)(2)(B) (1988).

60. MD. CODE ANN. NAT. RES. § 10-2A-05 (1990).

61. McKegg Interview, *supra* note 54.

62. 140 CONG. REC. S2639 (Mar. 9, 1994) (Statement of Sen. Conrad Burns) [hereinafter Burns Statement], available in LEXIS, Legis Library, Record File.

63. *Idaho Farm Bureau Fed'n v. Babbitt*, 839 F. Supp. 739 (D. Idaho 1993); 58 Fed. Reg. 5938 (1993) ("Determination of Endangered Status for the Bruneau Hot Springsnail in Southwestern Idaho").

64. See, e.g., Andrew Garber, *Tiny Snail Could Separate Ranchers from Their Wells*, GANNETT NEWS SERV., Dec. 14, 1992, available in LEXIS, Nexis Library, ARCNWS File ("It's damn scary," said Jean Jewett, who worries the tiny, black mollusk could close her cattle ranch, located in the rolling sagebrush-covered hills outside Bruneau.").

65. *Idaho Farm Bureau Fed'n v. Babbitt*, 839 F. Supp. 739 (D. Idaho 1993).

§ 706(2)(A), the court finds the final rule to be arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.⁶⁶

Ryan was frustrated by a comedy of procedural errors: "the FWS failed to make the decision in the allotted timeframe under the ESA, failed to provide an adequate public comment period, failed to make available key scientific evidence during the comment period, and drafted the final listing rule before the last comment period even began."⁶⁷

What is curious is that opponents of the ESA would cite this dispute as an illustration of why the existing system of endangered species protection needs to be fixed with proposals such as the Owners Bill. A full-blown trial was not needed to convince the court of the FWS's lapses, as the issue was decided at the summary judgment stage less than one year after the listing of the snail.⁶⁸ A complete picture of the ESA includes not only the final legislation and rules, but also public input, congressional oversight, and, as Judge Ryan would remind us, judicial review of agency action and inaction. This is a system that, for all the controversy it has engendered, is not yet broken.

The horror story quoted above refers to the snail tale as "the exception, not the rule."⁶⁹ This is certainly true, for *Idaho Farm Bureau* is the first instance of a judicial de-listing of an endangered species.⁷⁰ In other words, the prevailing "rule" is that federal bureaucrats, because their acts and omissions are so often subject to judicial scrutiny, are generally attentive to the substantive and procedural mandates included by Congress in the ESA.

HORROR STORY #6: In Montana last year, there was a headline that read like this: "Judge Says Grizzlies Have People Rights." . . . The story was about a rancher, John Shuler, at Choteau, MT [sic], who shot a grizzly bear in 1989 after he found three of these bears in his sheep corrals. He originally fired the shot to scare the bears away, but one bear did not scare and instead the bear charged him and he was forced to shoot the bear. . . .

The judge ruled that the Endangered Species Act self-defense exception must meet the same requirements used in criminal law for humans. The judge ruled that since this rancher had stepped off his porch to protect his investment, he purposefully placed himself in the zone of imminent danger of a bear attack. According to this judge, the rancher did not have the right to

66. *Idaho Farm Bureau*, 839 F. Supp. at 752.

67. *Judge Cites FWS Procedural Violations, Orders Delisting of Endangered Snail*, Nat'l Env't Daily (BNA), Dec. 20, 1993 [hereinafter *Judge Cites FWS*], available in LEXIS, Nexis Library, CURNWS File.

68. *Idaho Farm Bureau*, 839 F. Supp. at 753. The listing date was January 25, 1993, and the case was decided the following December 14.

69. Burns Statement, *supra* note 62.

70. *Judge Cites FWS*, *supra* note 66.

protect his property. And, folks, that probably calls for an attitudinal change, but basically that is wrong.⁷¹

We might easily concede that this frightening tale of a grizzly bear attack calls for an "attitudinal change," and indeed there has been some experimentation with private compensation for ranchers whose animals are victimized by dangerous endangered species.⁷² It does not necessarily follow, though, that the *legislative* change proposed by Senator Burns—the Owners Bill—would address the Shuler situation in any meaningful way, as the specific dispute did not involve the devaluation of any real property.

Also problematic is Senator Burns's account of the judge's rulings. First, Administrative Law Judge Sweitzer, in *United States Fish & Wildlife Service v. Shuler*,⁷³ did not "rule[] that the Endangered Species Act self-defense exception must meet the same requirements used in criminal law for humans."⁷⁴ The opinion characterizes the "law of self-defense with respect to criminal proceedings" as "appropriate for consideration although not controlling."⁷⁵

Second, stepping off his porch at around 10:30 p.m. to chase and wound the grizzly that was threatening his sheep was not the only way in which Shuler placed himself in danger. The *next morning* Shuler took his truck and his dog in search of the wounded bear, located the bear, and shot it three times.⁷⁶ Indeed, Mr. Shuler considered himself "lucky" to have been put in harm's way:

The way it was presented to me was the fact that I did get lucky. The situation could have gone the other way. I could have been two feet behind, slow getting out of the house, and the bears could have left. The bears could have crossed out of the light, and I wouldn't have seen them and wouldn't have done anything.

And I made the statement to implicate I was lucky. The cards fell into place.⁷⁷

Finally, the judge noted that "the regulations do not forbid plaintiffs from personally defending their property by means other than killing grizzly bears."⁷⁸ This is not an assertion that Shuler "did not have the

71. Burns Statement, *supra* note 62.

72. See Deroy Murdock, *Using Property Rights to Gain Ecological Goals*, SAN DIEGO UNION-TRIB., Feb. 11, 1994, available in LEXIS, Nexis Library, CURNWS File which states: "Defenders of Wildlife in Washington, D.C., has a far better idea. It launched a \$100,000 fund to compensate ranchers for any livestock killed by at-risk gray wolves in Montana. Since 1987, the fund has paid some \$12,000 to a dozen Montanans who suffered wolf-related animal losses."

73. 1993 NOAA LEXIS 14 (U.S. Dep't of Interior A.L.J. decision, Mar. 11, 1993).

74. Burns Statement, *supra* note 62.

75. *Shuler*, 1993 NOAA LEXIS 14 at *13.

76. *Id.* at *7-9.

77. *Id.* at *25 (quoting Transcript).

78. *Id.* at *15.

right to protect his property."⁷⁹ It is a reminder that Shuler, like all responsible citizens, can not go too far in the defense of property: "The regulations are reasonable in requiring private citizens to seek the assistance of experienced government officials, who may be expected to protect the public interest, rather than leaving every individual free to kill a 'nuisance bear' whenever he or she deems it necessary."⁸⁰

Shuler also asserted, in a posthearing brief, that he was "entitled to compensation from FWS for the 'taking' of his sheep by grizzly bear #53/54, which, according to Mr. Shuler, was acting as an agent of FWS."⁸¹ Judge Sweitzer ruled, however, that the administrative proceeding was an improper forum to decide such a constitutional issue.⁸² The Court of Appeals for the Ninth Circuit has already spoken on this issue, concluding that "the ESA and the grizzly bear regulations do not effect a taking of plaintiff's property by the government so as to trigger the just compensation clause of the fifth amendment, and that the government is not answerable for the conduct of the bears in taking plaintiffs' property."⁸³

Although one Supreme Court Justice and at least two law student authors disagree with this logic,⁸⁴ this form of "taking" is not yet judicially recognized. Neither, by the way, is it recognized under the Owners Act, which does not provide compensation for deprivations of personal property.

There is no question that, upon hearing or reading these tales of woe, it would be difficult for other politicians and their constituents to be unmoved and unsympathetic. But, for all its faults, Congress rarely moves without taking the opportunity to investigate the true nature of the problems it is being asked to solve. Proponents of the Owners Bill are apparently willing to take the risk that their agenda can survive this investigation. If their strategy were limited just to the recounting of scary stories, the worst they could be accused of would be stretching the truth for dramatic effect. As the next section reveals, however, the public discourse of the ESA's enemies in Congress contains a much more virulent, and much less defensible, element.

79. Burns Statement, *supra* note 62.

80. Shuler, 1993 NOAA LEXIS 14 at *14-*15.

81. *Id.* at *27.

82. *Id.*

83. Christy v. Hodel, 857 F.2d 1324, 1335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

84. See Christy v. Lujan, 490 U.S. 1114 (1989) (White, J., dissenting from denial of petition for writ of certiorari); Geoffrey L. Harrison, Comment, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. CHI. L. REV. 1101 (1991); David S. Klain, Casenote, *Does the Endangered Species Act Deprive an Owner of Fundamental Constitutional Rights: Christy v. Hodel*, 12 GEO. MASON U. L. REV. 421 (1990).

II. WRAPPED IN THE FLAG: ESA AS ANTI-AMERICAN

The property rights movement's rhetorical assault on the ESA is not confined to story-telling. Proponents of the Owners Bill, for example, have supplemented their tales of horror with an equally scary portrait of the individuals, organizations, and institutions who implement and support federal endangered species legislation.

The statements attributed to sponsors of the Owners Bill excerpted in Table I present a dramatic contrast. On one side stand the defenders of private property, the Constitution, the American way of life, democratic government, free enterprise, and mainstream America. The other side is populated by extremists, radicals, unelected and overzealous bureaucrats, and, yes, even communists.

TABLE I

PROPOSERS OF THE OWNERS BILL AND THE PRINCIPLES THEY REPRESENT	DEFENDERS OF THE ESA AND THE PRINCIPLES THEY REPRESENT
"Of all the freedoms we enjoy in this country, the ability to own, care for, and develop private property is perhaps the most crucial to our free enterprise economy." ⁸⁵	"Just as the Former Soviet Union and Eastern Bloc are discovering the critical need for private property, there are those in this country who in the name of environmental protection would seek to destroy the right to use your own land." ⁸⁶
"It is the concept of private property and respect of property rights that is one of the cornerstones of our free and democratic society." ⁸⁷	"At best these extremists tend to believe that our traditional notions of private property are old fashioned throw backs to our capitalist past that have outlived their usefulness. At worst they believe that all resources are to be shared by the masses and that they should be managed by the government for the benefit of all." ⁸⁸

85. 140 Cong. Rec. S2639 (Mar. 9, 1994) (Statement of Sen. Don Nickles) [hereinafter Nickles Statement], available in LEXIS, Legis Library, Record File.

86. 140 Cong. Rec. E233 (Feb. 23, 1994) (Statement of Rep. Don Young) [hereinafter Young Statement], available in LEXIS, Legis Library, Record File.

87. *Id.*

88. *Id.*

<p>"So sacred and important are these [private property] rights, that our forefathers chose to specifically protect them in the fifth amendment to the U.S. Constitution"89</p>	<p>"federal bureaucrats who ignore the rights our ancestors fought and died for more than two centuries ago"90</p>
<p>"the right and means to expeditiously appeal decisions by unelected bureaucrats"; "swift and fair compensation to those property owners who happen to own land where the bald eagle likes to nest or the fountain darter likes to swim"91</p>	<p>"overzealous bureaucrats [who should be prevented] from using their authority in ways which threaten property rights."92</p>
<p>"the environmental movement of old, the movement that grew out of conservatism and the desire not only to be good stewards of the land, but to ensure the quality of the human environment as well"93</p>	<p>"environmental laws and regulations that have lost touch with reason and reality"94</p>
<p>"According to a recent national poll, [the] more than 90 percent of Americans [who] support efforts to protect private-property rights."95</p>	<p>"extremist environmental groups"96</p>
<p>"I support the goals of our nation's environmental laws, such as the Endangered Species Act."97</p>	<p>"Unfortunately, there is a growing attitude within the federal bureaucracy that it is acceptable to disregard the legal rights of private property owners, as long as the goal is a laudable one."98</p>

89. Nickles Statement, *supra* note 85.

90. Jack Fields, *Proposed Measure Won't Leave Wetlands Owners High and Dry*, HOUSTON POST, July 17, 1994, available in LEXIS, Nexis Library, CURNWS File.

91. Fields Statement, *supra* note 39.

92. Nickles Statement, *supra* note 85.

93. Tauzin I, *supra* note 2.

94. *Id.*

95. Tauzin II, *supra* note 18.

96. Tauzin I, *supra* note 2; Tauzin II, *supra* note 18.

97. Tauzin I, *supra* note 2.

98. 140 Cong. Rec. E237 (Feb. 23, 1994) (Statement of Rep. Billy Tauzin) [hereinafter Tauzin Statement], available in LEXIS, Legis Library, Record File.

Owners Bill "is not about creating new rights. Rather, it is about preserving old rights." ⁹⁹	"Radical environmentalists disagree with the Founding Fathers who wrote and ratified the Constitution, arguing that the Endangered Species Act (ESA), federal wetlands regulations and other environmental protection measures should supersede the Constitution." ¹⁰⁰
"This bill reaffirms our basic property rights and returns some balance to our legal system." ¹⁰¹	"many people in the Federal bureaucracy [who] believe that public protection of health, safety, and the environment is not compatible with protection of private property rights" ¹⁰²
"The private property owners bill of rights reawakens America's commitment to the concept of private ownership of property." ¹⁰³	"We have new tyrants depriving us of our inalienable rights of life, liberty, and property—King George has been replaced by bureaucrats and kangaroo rats." ¹⁰⁴

CONCLUSION

The new Congress is being treated to more of this same rhetoric, as the House and Senate begin serious debate over the takings provisions included in the Republicans' Contract with America.¹⁰⁵ Ironically, the Owners Bill, with its fifty percent threshold and focus on but two federal statutes, is moderate in comparison with proposals tied more closely to the Contract.¹⁰⁶

The faux horror stories recited above and the Manichaeian division symbolized by Table I should trouble those concerned about and engaged in the crucial debate over the future of federal environmental regulation. Perhaps the best we can hope for is that—at the drafting stage, during crucial votes, or as the President considers a veto—common sense, not false fear or patriotic posturing, will prevail.

99. 140 Cong. Rec. S2639 (Feb. 22, 1994) (Statement of Sen. Richard Shelby) [hereinafter Shelby Statement], available in LEXIS, Legis Library, Record File.

100. Fields Statement, *supra* note 39.

101. *Id.*

102. Nickles Statement, *supra* note 84.

103. Tauzin Statement, *supra* note 97.

104. Fields Statement, *supra* note 39.

105. See, e.g., *Proposed Employer "Bill of Rights" Dumped; Alternative Provisions Adopted*, DAILY REPORT FOR EXECUTIVES (BNA), Feb. 23, 1995, available in LEXIS, Nexis Library, CURNWS File.

106. See *supra* note 13.

APPENDIX
103RD CONGRESS; 2ND SESSION
IN THE HOUSE OF REPRESENTATIVES
AS INTRODUCED IN THE HOUSE

H.R. 3875

SYNOPSIS:
A BILL

To require certain Federal agencies to protect the rights of private property owners.

TEXT:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Private Property Owners Bill of Rights."

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds the following:

- (1) Our democracy was founded on principles of ownership, use, and control of private property. These principles are embodied in the fifth amendment to the Constitution prohibiting the taking of private property without the payment of just compensation.
- (2) A number of Federal environmental programs, specifically the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) have been implemented by employees, agents, and representatives of the Federal Government in a manner that deprives private property owners of the use and control of their property.
- (3) As new Federal programs are proposed that would limit and restrict the use of private property to provide habitat for plant and animal species, the rights of private property owners must be recognized and respected.
- (4) Private property owners are being forced by Federal policy to resort to extensive, lengthy, and expensive litigation to protect certain basic civil rights guaranteed by the Constitution.
- (5) Since many private property owners do not have the financial resources or the extensive commitment of time to proceed in litigation against the Federal Government, a clear Federal policy is needed to guide and direct Federal agencies with respect to their implementation of environmental laws that directly impact private property.

(6) While all private property owners should and must abide by current nuisance laws and should not use their property in a manner that harms their neighbors, these laws have traditionally been enacted, implemented, and enforced at the State and local levels where they are best able to protect the rights of all private property owners and local citizens.

(7) While traditional pollution control laws are intended to protect the general public's health and physical welfare, current habitat protection programs are intended to protect the welfare of plant and animal species, while allowing the recreational and esthetic opportunities for the public.

(b) **PURPOSES.**—It is the purpose of this Act to provide a consistent Federal policy to encourage, support, and promote the private ownership of property and to ensure that the constitutional and legal rights of private property owners are protected by the Federal Government, its employees, agents, and representatives.

SEC. 3. PROTECTION OF PRIVATE PROPERTY RIGHTS.

(a) In implementing and enforcing the Acts, each agency head shall comply with applicable State and tribal government laws, including laws relating to private property rights and privacy; and shall administer and implement the Acts in a manner that has the least impact on private property owners' constitutional and other legal rights.

(b) Each agency head shall develop and implement rules and regulations for ensuring that the constitutional and other legal rights of private property owners are protected when the agency head makes, or participates with other agencies in the making of, any final decision that restricts the use of private property.

SEC. 4. PROPERTY OWNER CONSENT FOR ENTRY.

(a) An agency head may not enter privately-owned property to collect information regarding the property, unless the private property owner has—

(1) consented in writing to that entry;

(2) after providing that consent, been provided notice of that entry; and

(3) been notified that any raw data collected from the property must be made available at no cost, if requested by the private property owner.

(b) Subsection (a) does not prohibit entry onto property for the purpose of obtaining consent or providing notice required under subsection (a).

**SEC. 5. RIGHT TO REVIEW AND DISPUTE DATA
COLLECTED FROM PRIVATE PROPERTY.**

An agency head may not use data that is collected on privately-owned property to implement or enforce any of the Acts, unless—

- (1) the agency head has provided to the private property owner—
 - (A) access to the information;
 - (B) a detailed description of the manner in which the information was collected; and
 - (C) an opportunity to dispute the accuracy of the information; and
- (2) the agency head has determined that the information is accurate, if the private property owner disputes the information pursuant to subparagraph (C).

**SEC. 6. RIGHT TO AN ADMINISTRATIVE APPEAL OF
WETLANDS DECISIONS.**

Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended by adding at the end the following new subsection:

“(u) ADMINISTRATIVE APPEALS.—

“(1) The Secretary or Administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this section:

“(A) A determination of regulatory jurisdiction over a particular parcel of property.

“(B) The denial of a permit.

“(C) The terms and conditions of a permit.

“(D) The imposition of an administrative penalty.

“(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.

“(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the property involved in the action.”.

**SEC. 7. RIGHT TO ADMINISTRATIVE APPEAL UNDER
THE ENDANGERED SPECIES ACT OF 1973.**

Section 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended by adding at the end the following new subsection:

“(i) ADMINISTRATIVE APPEALS.—

“(1) The Secretary shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this Act:

“(A) A determination that a particular parcel of property is critical habitat of a listed species.

“(B) The denial of a permit for an incidental take.

“(C) The terms and conditions of an incidental take permit.

“(D) The imposition of an administrative penalty.

“(E) The imposition of an order prohibiting or substantially limiting the use of the property.

“(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action.”.

SEC. 8. COMPENSATION FOR TAKING OF
PRIVATE PROPERTY.

(a) ELIGIBILITY.—A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 50 percent or more of the fair market value, or the economically viable use, of the affected portion of the property, as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with this section.

(b) DEADLINE.—Within 90 days after receipt of a final decision of an agency head that deprives a private property owner of fair market value or viable use of property for which compensation is required under subsection (a), the private property owner may submit in writing a request to the agency head for compensation in accordance with subsection (c).

(c) AGENCY HEAD'S OFFER.—The agency head, within 180 days after the receipt of a request for compensation, shall stay the decision and shall provide to the private property owner —

(1) an offer to purchase the affected property of the private property owner at a fair market value assuming no use restrictions under the Acts; and

(2) an offer to compensate the private property owner for the difference between the fair market value of the property without those restrictions and the fair market value of the property with those restrictions.

(d) **PRIVATE PROPERTY OWNERS' RESPONSE.**—A private property owner shall have 60 days after the date of receipt of the agency head's offers under subsection (c) (1) and (2) to accept one of the offers or to reject both offers. If the private property owner rejects both offers, the private property owner may submit the matter for arbitration to an arbitrator appointed by the agency head from a list of arbitrators submitted to the agency head by the American Arbitration Association. The arbitration shall be conducted in accordance with the real estate valuation arbitration rules of that association. For purposes of this section, an arbitration is binding on the agency head and a private property owner as to the amount, if any, of compensation owed to the private property owner and whether for purposes of this section the private property owner has been deprived of fair market value or viable use of property for which compensation is required under subsection (a).

(e) **JUDGMENT.**—A qualified agency action of an agency head that deprives a private property owner of property as described in subsection (a), is deemed, at the option of the private property owner to be a taking under the Constitution of the United States and a judgment against the United States if the private property owner—

- (1) accepts the agency head's offer under subsection (c); or
- (2) submits to arbitration under subsection (d).

(f) **PAYMENT.**—An agency head shall pay a private property owner any compensation required under the terms of an offer of the agency head that is accepted by the private property owner in accordance with subsection (d), or under a decision of an arbiter under that subsection, by not later than 60 days after the date of the acceptance or the date of the issuance of the decision, respectively.

(g) **FORM OF PAYMENT.**—Payment under this section, as that form is agreed to by the agency head and the private property owner, may be in the form of—

- (1) payment of an amount equal to the fair market value of the property on the day before the date of the final qualified agency action with respect to which the property or interest is acquired;
- (2) a payment of an amount equal to the reduction in value; or
- (3) conveyance of real property or an interest in real property having a fair market value equal to that amount.

(h) **OTHER RIGHTS PRESERVED.**—This section does not preempt, alter, or limit the availability of any remedy for the taking of property or an interest in property that is available under the Constitution or any other law.

(i) **FINAL JUDGMENTS.**—When a private property owner unsuccessfully seeks compensation under this section and thereafter files a claim for compensation under the fifth amendment to the Constitution and is successful in obtaining a final judgment ordering compen-

sation from the claims court for that claim, the agency head making the final agency decision resulting in the taking shall reimburse the judgment fund for the amount of the judgment against the United States from funds appropriated to the agency for the 2 fiscal years following payment.

SEC. 9. DEFINITIONS.

For the purpose of this Act the following definitions apply:

- (1) "The Acts" means the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and the section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344).
- (2) "Agency head" means the Secretary or Administrator with jurisdiction or authority to take a final agency action under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344).
- (3) "Non-Federal person" means a person other than an officer, employee, agent, department, or instrumentality of—
 - (A) the Federal Government; or
 - (B) a foreign government.
- (4) "Private property owner" means a non-Federal person (other than an officer, employee, agent, department, or instrumentality of a State, municipality, or political subdivision of a State, or a State, municipality, or subdivision of a State) that—
 - (A) owns property referred to in paragraph (5) (A) or (B); or
 - (B) holds property referred to in paragraph (5)(C).
- (5) "Property" means—
 - (A) and;
 - (B) any interest in land; and
 - (C) any proprietary water right.
- (6) "Qualified agency action" means an agency action (as that term is defined in section 551(13) of title 5, United States Code) that is—
 - (A) under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344); or
 - (B) under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

SEC. 10. PRIVATE PROPERTY OWNER PARTICIPATION IN COOPERATIVE AGREEMENTS.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended by adding at the end the following new subsection:

“(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes restrictions on the use of property, the Secretary shall notify all private property owners or lessees of the property that is subject to the management agreement and shall provide an opportunity for each private property owner or lessee to participate in the management agreement.”